United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

[redacted]

No's. 17,464 & 17,465 (Consolidated)

BRIEF FOR THE APPELLANTS AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1962

421

No. 17,464

CLARENCE STUDEMEYER,
Appellant,

v.

JOHN W. MACY, JR., Chairman, United States Civil Commission, ET AL.,
Appellees.

No. 17,465

WOODROW STUDEMEYER,
Appellant,

v.

JOHN W. MACY, JR., Chairman, United States Civil Commission, ET AL.,
Appellees.

Appeal from the United States District Court for the District of Columbia

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

No's. 17,464 & 17,465

QUESTION PRESENTED

Whether the Appellants, both permanent civil service employees with veterans preference, were legally discharged from their governmental positions in the Charleston Air Force Base, Charleston, South Carolina.

INDEX

CASES CITED

STATUTES

ORIGINAL

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BRIEF FOR THE APPELLANTS

JURISDICTIONAL STATEMENT

Judgment in the case of Clarence Studemeyer v. Macy, et al. was entered on September 28, 1962. (A. 17) Notice of appeal was filed on October 31, 1962.

Judgment in the case of Woodrow Studemeyer v. Macy, et al. was entered on September 28, 1962. (A. 34) Notice of appeal was filed on October 31, 1962.

Notices of appeal in both cases were filed within 60 days after the entry of the judgments. Jurisdiction of these appeals is granted under Title 28, Section 1291 of the United States Code.

STATEMENT OF THE CASE OF CLARENCE STUDEMEYER v. MACY, ET AL.

The Appellant, Clarence Studemeyer, brought this action for a declaratory judgment and a mandatory injunction against John W. Macy, Jr., Chairman of the United States Civil Service Commission, and Frederick J. Lawton and Robert E. Hampton, Members of the United States Civil Service Commission, and Eugene M. Zuckert, Secretary of the Air Forces. The Appellant prayed for an Order of the United States District Court below to determine and fix his rights as a civil service employee of the United States, and to restore him to his rightful position and grade in the governmental service from which he alleged that he was wrongfully discharged. (A. 1-6)

This Appellant was employed as a Foreman in the Plumbing Shop at the Charleston Air Force Base located in Charleston, South Carolina, and on September 29, 1960 certain alleged and pretended charges were filed against him by one Lt. Col. Harry P. Cousans who was in charge of the Installation having direct supervision over the Appellant in the said Air Force Base. Immediately after such charges were filed, Appellant made a demand for a personal hearing before the Commanding Officer of the said Air Force Base, in accordance with Section 14 of the Veterans Preference Act of June 27, 1944 and in accordance with the regulations of the Civil Service Commission, the Appellant being a per-

manent civil service employee with veterans' preference. The request for a personal hearing before the Commanding Officer of the said Air Force Base was denied. On November 1, 1960 he was removed from his governmental position by Harry P. Cousans, the Lt. Col. who had filed the charges against the Appellant. This commissioner officer acted in the capacity of an accuser, prosecutor, Judge and executioner, and the Appellant contends that all the proceedings in his removal were illegal and unlawful, null and void, and of no legal effect.

The Appellant pursuant to Section 14 of the Veterans Preference Act, supra, duly and timely appealed to the Civil Service Commission, and such proceedings were had that his appeal was in all things denied, and any administrative right of review was fully exhausted prior to the institution of this action.

At the hearing in the District Court Appellant filed a motion for a summary judgment, and a motion for summary judgment was likewise filed on behalf of the Appellees. Court sustained the motion of the Appellees and denied Appellant's motion. (A. 17)

STATEMENT OF THE CASE OF WOODROW STUDEMEYER v. MACY, ET AL.

Appellant, Woodrow Studemeyer, brought this action against John W. Macy, Jr., Chairman, U. S. Civil Service Commission, and Frederick J. Lawton and Robert E. Hampton, Members of the U. S. Civil Service Commission, and Eugene M. Zuckert, Secretary of the Air Forces, praying for an Order adjudicating his rights as a governmental employee of the United States and for a mandatory injunction requiring said defendants to restore him to his rightful position in government service of the United States. (A. 18-23)

The Appellant, Woodrow Studemeyer, was employed in the capacity of an Aircraft Freight Loader at the Charles-

ton Air Force Base located at Charleston, South Carolina. On October 17, 1960 said alleged and pretended charges were filed against the Appellant by Lt. Col. Everett M. Hockwald alleging that Appellant has been guilty of insubordination because on October 12, 1960 while the Appellant was helping with the unloading of lettuce from a truck, and while he had a case of lettuce in his hands, he did not within five seconds from the time he was ordered pick up a crate of lettuce which had fallen from the truck which the Appellant was in the process of doing when he was then and there charged with insubordination and ordered to report to the Air Forces officers.

In accordance with the provisions of Section 14 of the Veterans Preference Act of June 27, 1944 (5 USC 863) Appellant demanded a personal hearing on said charges before the Commanding Officer of the Charleston Air Force Base, but his demand in this respect was in all things denied.

Appellant was discharged on November 9, 1960 from his governmental position effective November 18, 1960 by the said Lt. Col. Everett M. Hockwald, acting on his own charges in the capacity of accuser, prosecutor, Judge and executioner. Appellant immediately filed his appeal in accordance with Section 14 of the Veterans Preference Act to the United States Civil Service Commission, and thereafter such proceedings were had that the appeal of the Appellant was in all things denied by the said Civil Service Commission, and any administrative right of appeal that Appellant had was fully exhausted prior to the institution of this action.

STATEMENT OF POINTS ON APPEAL

(Clarence Studemeyer)

1. That the court erred in sustaining defendants' motion for summary judgment, and in denying plaintiff's motion for summary judgment.

2. That the court erred in not holding that a procedural error was apparent when the officials of the Charleston Air Force Base refused to have present at the hearing the persons designated in the affidavit of the plaintiff dated July 18, 1962.

3. That the court erred in failing to hold that there was a procedural error because the Commanding Officer of the Charleston Air Force Base refused a personal hearing to the plaintiff as required under Section 14 of the Veterans Preference Act (5 USC 863).

4. That the court erred in failing to hold that there was a procedural error because the charges against the Appellant were filed by one Lt. Col. Harry P. Cousans who acted on his own charges in the capacity of accuser, prosecutor, Judge and executioner, the said Lt. Col. Harry P. Cousans being the person who discharged the plaintiff from his governmental position.

5. For any other errors apparent of record.

STATEMENT OF POINTS ON APPEAL

(Woodrow Studemeyer)

1. That the court erred in sustaining the defendants' motion for a summary judgment, and in denying plaintiff's motion.

2. That the court erred in not finding that there was a procedural error when the Appellant was discharged by Lt. Col. Everett M. Hockwald, who had filed charges against the Appellant, and who acted in the capacity of accuser, prosecutor and Judge of his own charges.

3. That the court erred in failing to find that there was a procedural error in that the Appellant had demanded a personal hearing before the Commanding Officer of the Charleston Air Force Base in accordance with Section 14 of the Veterans Preference Act (5 USC 863), and that his request for a personal hearing was denied.

4. For any other errors apparent of record.

SUMMARY OF THE ARGUMENT

The Appellants will argue that the court below erred in sustaining the Appellees' motions for summary judgment, and refusing to sustain the Appellants' motions for summary judgment.

The argument is predicated upon the ground that procedural errors are apparent from the consolidated record. It will be asserted that the Appellant, Clarence Studemeyer, could not be discharged from his governmental position based upon the charges filed against him by Lt. Col. Harry P. Cousans, who acted in the capacity of accuser, prosecutor and Judge and executioner. The contention will also be made in regard to Woodrow Studemeyer that he could not be discharged from his governmental position based upon the charges filed against him by Lt. Col. Everett M. Hockland, who acted in the capacity of accuser, prosecutor, Judge and executioner.

It will also be argued that a personal hearing before the Commanding Officer of the Charleston Air Force Base requested by both Appellants was denied.

ARGUMENT AND BRIEF

Both of these Appellants, who are brothers, were discharged from their governmental positions in the Charleston Air Force Base, Charleston, South Carolina by subordinate officers who were more or less their immediate superiors.

Clarence Studemeyer had charges filed against him by Lt. Col. Harry P. Cousans, and Woodrow Studemeyer had charges filed against him by Lt. Col. Everett M. Hockwald. The decision on the charges to dismiss each of the Appellants was made by the same Lt. Colonels who had filed the charges against them. The Appellants thereafter squarely raised the question as to whether a subordinate

official of the United States may act in the capacity of a accuser, prosecutor, Judge and executioner. The Commanding Officer of the Charleston Air Force Base did not act on the charges, and in fact denied a personal hearing to both of the Appellants.

The question of whether the Lt. Colonels could act in the capacity of accuser, prosecutor, Judge and executioner was squarely raised before the Civil Service Commission, and as far as it is known it was the first time that this question had been put before them, so there is no conflict in the record as far as this question is concerned. The Civil Service Commission in holding that it was proper for a subordinate official to adjudicate his own charges is a throwback to the days before there was the establishment of a Civil Service Commission, the days that are often referred to as "the hire and fire days" when a government employee could be fired at will. Counsel for the Appellants have made a detailed research of the authorities in an attempt to find any Federal authorities that justify the contention that a government employee who had charges filed against him may be dismissed by the same official who filed the charges. If there are any such authorities, counsel for the Appellants was unable to find them.

The purpose of this appeal is to have this court rule squarely on the question, and if we have gone back to the days of "hire and fire" of employees, the matter may be brought to the attention of Congress for amendatory legislation. Congress over the years has attempted to throw around government employees who are civil service employees with veterans preference certain rights and privileges, but all of these rights and privileges enacted by Congress or by the regulations of the Departments and Executive Orders of the President of the United States are of no avail if a dismissal of a government employee can be made on the basis of charges filed by an

official who adjudicates his own charges. At least to the extent of dismissal from government service.

The Supreme Court of the United States in the case of *Green* v. *McElroy*, *360 U.S. 474, 3 L.Ed. 2d 1377*, held that administrative hearings must be fair and should be held by unbiased officials even in cases where no constitutional question is involved. In the Green v. McElroy opinion, the Supreme Court adhered to the rule laid down in *Tamey* v. *Ohio, 77 L.Ed. 749, 273 U.S. 510, 522, 523.*

It should be apparent to anyone that an official who files charges would sustain the charges which he made. The Public Administrative Act was discussed by this court in the case of Treat & Co., Inc., et al. v. Securities and Exchange Commission, et al. decided on May 11, 1962. In a splendid opinion by Judge Danaher of this court, this court said:

> "Litigants are entitled to an impartial tribunal whether it consists of one man or twenty, and there is no way which we know of whereby the influence of one upon the others can be quantatively measured."

And in the Treat case reference was made to the case of Trans World Airlines v. Civil Aeronautics Board, 254 F.2d 90, 91, 102 U.S. App. D.C. 391, 392 holding that a Solicitor who signed a brief to the Board in behalf of the Postmaster General and thereafter became a member of the Board, that his participation in the proceedings was illegal.

While the Public Administrative Act does not apply to personnel of the government, the principles of that Act are a declaration by Congress to the effect that administrative hearings must be held before fair and impartial officials. No reason is apparent why permanent civil service employees such as these Appellants should not be accorded a hearing before a fair and impartial board,

and they did not receive such a hearing before the officials of the Charleston Air Force Base.

It is therefore suggested that this court by analogy should apply the opinions of Treat & Co., Inc. et al. v. Securities and Exchange Commission, et al., supra, and Trans World Airlines v. Civil Aeronautics Board, supra, in deciding this case.

While this court is not bound or subject to the decisions of State courts, the question involved in this case has been decided by a number of the higher courts of the States.

Davis on Administrative Law, par. 136, pg. 435.

The New York Court of Appeals has declared unequivocally that no man may be both the accuser and Judge.

Sharkey v Thurston, 268 NY 123, 126, 196 NE 766, 767

Judge Groner, formerly a member of this court, submitted his views with a report of the Attorney General's Commission and subject to adjudication by agency which has initiated and conducted the prosecution.

Report Attorney General's Commission, A.D. Proc. 248-50 (1941)

Additional decisions of State courts follow:

Nider v Homan, 32 Cal. App. 2d 11, 20, 89 Pac. 2d 136

State ex rel. Barnard v Board of Education, 19 Wash. 9, 52 P. 317, 40 L.R.A. 317, 67 Am. St. Rep. 706

State ex rel. Miller v Aldridge, 212 Ala. 660, 103 So. 835, 39 A.L.R. 1470

State ex rel. La Crosse v Averill, Tex. Civ. App. 110 SW 2d 1173

Stockwell v Township Board of White Lake, 22 Mich. 341

Metsker v Whitesell, 181 Ind. 126, 103 NE 1078

Craft v Davidson, 189 Ky. 378, 224 SW 1082

People v Neimark, 154 App. Div. 760, 139 NY Suppl. 418

Sharkey v Thurston, Supra.

Davis on Administrative Law, Supra.

In the case of *Sandahl* v. *City of Des Moines, 227 Iowa 1310, 290 NW 697* the Supreme Court of Iowa held that one cannot act as an accuser, prosecutor, and Judge of charges filed against a civil service employee of the State of Iowa. In reaching this conclusion, the Supreme Court of Iowa cited the following cases. *Rearden* v. *Dental Commission, 128 Conn. 116, 120, 20 At. 2nd 622, 624,* and *Hannah* v. *Board of Aldermen, 54 R.I. 392, 397, 173 At. 358, 360.*

The only exception to the rule is the rule of necessity. Thus, where a civil service employee of a municipality has charges filed against him by the Mayor, the Mayor may adjudicate the charges because there is no higher official in the municipality than himself. That factor is not present in these cases, and it is the only exception to the rule that the hearing must be before a fair and impartial official in all the decisions we have been able to find.

The only other question involved in this case is the denial of the personal hearing to both Appellants by the Commanding Officer of the Charleston Air Force Base. This right was accorded them under Section 14 of the Veterans Preference Act of June 27, 1944. (5 USC 863)

THE APPELLANTS WERE ENTITLED TO A PERSONAL HEARING BEFORE THEIR COMMANDING OFFICER

Section 14 of the Veterans Preference Act of June 27, 1944 (5 USC 863) provides that where charges are filed against veterans who are employees of the government such as these Appellants, they are entitled to a personal hearing on such charges. This has been authoritatively

determined by the courts and the United States Civil Service Commission.

This court in the William Ody Washington case (97 US App. D.C. 105; 228 F.2d 452) held on November 3, 1955 that a veteran preference eligible was not entitled to a personal hearing. William Ody Washington filed a suit in the United States Court of Claims predicated upon the same claim that he had presented to this court, and the Court of Claims held on June 16, 1957 (137 Ct.Cl. 344; 147 Fed. Suppl. 284) that he was entitled to a personal hearing.

Due to the conflict between the opinions of this court and the Court of Claims on the same question, a petition for certiorari was filed in the Supreme Court of the United States, but it was determined by the Solicitor General of the United States that the petition for certiorari would be dismissed, and it was dismissed. (355 US 801; 2 L.Ed. 2d 19)

Thereafter the United States Civil Service Commission issued a circular letter (Departmental Circular 900, dated February 8, 1957; Federal Personnel Manual 772-4, June 7, 1962) advising all of its officers that a veteran preference eligible was entitled to a personal hearing in accordance with the ruling of the United States Court of Claims.

The court will note that at the time each of these Appellants demanded a personal hearing before their Commanding Officer was after the Civil Service Commission had issued its circular letter advising that under the decision of the United States Court of Claims veteran preference eligibles were entitled to a personal hearing. Both of these Appellants were entitled to a personal hearing which they did not receive. If there is any issue of fact in this regard, the Appellee's motion for summary judgment could not be sustained. The rule is that if there is any issue of fact to be determined, a motion for sum-

mary judgment must be denied. This rule is so well known it does not require citation of authority.

CONCLUSION

The Appellants insist that this court should reverse the District Court below upon the grounds that they were illegally and unlawfully discharged from their governmental positions, and that the District Court should be directed to restore them to their proper governmental positions as of the date of their illegal and unlawful discharges. Or, in the alternative, that these cases should be remanded to the District Court to determined the question of whether the Appellants were entitled to a personal hearing before the Commanding Officer of the Charleston Air Force Base, and if they were so entitled, then their discharges were illegal and unlawful.

Respectfully submitted,

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APPELLANTS' APPENDIX

APPELLANTS' APPENDIX

Filed March 20, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 909-62

CLARENCE STUDEMEYER, 103 Temple Avenue, North Charleston, South Carolina.
Plaintiff,

v.

JOHN W. MACY, JR., Chairman, U. S. Civil Service Commission, Washington, D. C.

FREDERICK J. LAWTON, Member, U. S. Civil Service Commission, Washington, D. C.

ROBERT E. HAMPTON, Member, U. S. Civil Service Commission, Washington, D. C.

and

EUGENE M. ZUCKERT, Secretary of the Air Forces, of the United States, Washington, D. C.
Defendants.

SUIT BY A VETERAN PREFERENCE ELIGIBLE FOR AN ORDER ADJUDICATING HIS RIGHTS AS A GOVERNMENTAL EMPLOYEE OF THE UNITED STATES, AND FOR A MANDATORY INJUNCTION REQUIRING THE SAID DEFENDANTS TO RESTORE HIM TO HIS RIGHTFUL POSITION IN GOVERNMENT SERVICE OF THE UNITED STATES, AND FOR SUCH OTHER AND FURTHER RELIEF THAT TO THE COURT MAY APPEAR TO BE EQUITABLE AND JUST.

The plaintiff for his cause of action complains of the defendants, and alleges:

1. That the plaintiff is a citizen of the United States and a resident of the State of South Carolina, and that the value of the objective of this action exceeds the sum of Ten Thousand Dollars exclusive of interest and costs.

2. That the said defendant, John W. Macy, Jr., is the duly appointed, acting and qualified Chairman of the United States Civil Service Commission, and is sued in that capacity only.

3. That the defendant, Frederick J. Lawton, is a duly appointed, acting and qualified member of the United States Civil Service Commission, and is sued in that capacity only.

4. That the defendant, Robert E. Hampton, is a duly appointed, acting and qualified member of the United States Civil Service Commission, and is sued in that capacity only.

5. That the defendant, Eugene M. Zuckert, is the duly appointed, acting and qualified Secretary of the Air Forces of the United States, and is sued in that capacity only.

6. That the said defendants, John W. Macy, Jr., Frederick J. Lawton, and Robert E. Hampton, constitute the sole membership of the United States Civil Service Commission, and that they are charged by law with the Administration of the so-called Civil Service laws of the United States relating to employees of the United States, and that among other things that they are charged with the proper administration of the Veterans Preference Acts, namely the Act of June 27, 1944, and its amendments, and that it is their duty to honestly and fairly administer all laws under which they are authorized to operate.

7. The plaintiff alleges that the said defendant, Eugene M. Zuckert, in his official capacity as Secretary of the Air Forces is charged by law with the employment, re-

tention, and discharge of all civilian employees under his Department wherever located, and particularly the employees of the United States employed at the Charleston Air Force Base located at Charleston, South Carolina. The plaintiff alleges in this connection that the said defendant, Eugene M. Zuckert, in his official capacity does not have an absolute right to employ, retain, or discharge any employee he may desire, but that at all times he is subject to all of the provisions of the laws commonly known as the Civil Service laws of the United States, the lawful regulations of the United States Civil Service Commission, the Executive orders of the President of the United States, and the provisions of the Veterans Preference Act of June 27, 1944, and its amendments, and the lawful regulations issued pursuant to such Act.

8. The plaintiff alleges that on September 29, 1960, and while he was employed as a Foreman in the Plumbing Shop at the Charleston Air Force base, certain alleged and pretended charges were filed against him captioned as "Notice of Proposed Removal" which said charges were made by one Harry P. Cousans, Lt. Colonel. That immediately after said charges were served upon the plaintiff, he made a demand for a personal hearing before the Commanding Officer of the said Air Force base in accordance with Section 14 of the Veterans Preference Act of June 27, 1944, and in accordance with regulations of the Civil Service Commission, but said request was denied, and that thereafter on November 1, 1960 he was removed from his governmental position by the said Harry P. Cousans, Lt. Colonel, who acted in the capacity of accuser, prosecutor, judge, and executioner, and that the plaintiff did not receive a fair and impartial hearing in the Charleston Air Force Base, and that all actions taken by the said Lt. Colonel Harry P. Cousans were illegal and unlawful, null and void, and of no legal effect in removing the plaintiff from his governmental position.

9. The plaintiff alleges that at the time of his removal he was a veteran preference eligible as that term is defined in section 2 of the Veterans Preference Act of June 27, 1944 (5 U.S.C. 851), and entitled to all of the rights, benefits and privileges of the said Veterans Preference Act, and its amendments. That pursuant to Section 14 of the Veterans Preference Act he duly and timely appealed his removal from governmental service to the United States Civil Service Commission, and that thereafter an alleged and pretended hearing was held before the officials of the Fifth Regional Office of the United States Civil Service Commission. That at such alleged hearing the plaintiff demanded the right to have a competent stenographer present to take the testimony which he offered to pay for, but this request was in all things denied, and plaintiff and his counsel prior to such hearing demanded that certain civil service employees be required to attend the hearing and to testify in his behalf, namely, William J. Donovan, and John M. Dunning, the request was denied despite the fact that there was a lawful order of the Chairman of the Civil Service Commission to the effect that at any hearing any civil service employee who was a witness would be required to appear as a witness at such hearing, which said order had long since been in effect prior to the hearing. Plaintiff further alleges that the chairman at the hearing was the same person who had investigated the charges against the plaintiff, and that he was neither a fit or proper person to conduct the hearing and that for the reasons herein alleged the plaintiff did not receive a fair or an honest hearing before the Regional Office of the Civil Service Comission at Atlanta, Georgia.

10. The plaintiff alleges that the decision of the Fifth Regional Office of the United States Civil Service Commission was adverse to him, and that thereafter the plaintiff in due and timely course appealed the said decision to the

Board of Appeals and Review of the said Civil Service Commission in Washington, and that his appeal was in all things finally decided adverse to the plaintiff on February 2, 1962. That the plaintiff has now fully exhausted any administrative right of appeal, and unless this Court grants the relief sought by this action, he will be without remedy.

11. The plaintiff asserts the following procedural errors in all of the proceedings herein noted that resulted in his dismissal from his governmental position.

1. The charges against him were made by Lt. Colonel Harry P. Cousans, who acted as accuser, prosecutor, judge and executioner to carry out his charges.

2. That in accordance with Section 14 of the Veterans Preference Act the plaintiff demanded a personal hearing before his commanding officer which was denied.

3. The refusal of the Fifth Regional Office of the Civil Service Commission to permit a stenographer to take down the testimony at plaintiff's hearing deprived him of a fair hearing.

4. The failure of the officials of the Fifth Regional Office to require the presence of civil service employees of the United States to appear at the hearing prevented a fair hearing.

5. That the Hearer who heard the testimony at the Fifth Regional Office and made his report by a summary of the evidence adduced at such hearing was the same and identical person who made the investigation of the charges against the plaintiff, and that he was not a fair or impartial official before whom the testimony should have been taken, and the plaintiff was thus deprived of a fair hearing.

12. The plaintiff alleges that he was illegally and unlawfully separated from his governmental position, and that

this Court in the interest of right and justice should order the said defendants to restore him retroactively to his proper position and grade as of the date of his illegal and unlawful separation from his governmental position.

WHEREFORE, the Plaintiff prays:

1. That due process issue directed to the said defendants, and each of them, commanding them to appear and answer this complaint.

2. That the Court decree and declare that the plaintiff's separation from his governmental position was illegal, and that the Court issue a mandatory injunction directed to the said defendants commanding and requiring them to restore the plaintiff to his position and grade in the service of the United States retroactively as of the date of his illegal discharge, together with all rights, benefits and privileges flowing from a continuity of such service from the date of his reinstatement.

3. That the plaintiff have such other and further relief as to the Court may appear to be equitable and just.

/s/ Clarence Studemeyer
CLARENCE STUDEMEYER
Plaintiff

/s/ Claude L. Dawson
CLAUDE L. DAWSON,
Attorney for the Plaintiff,
1049 Shoreham Building,
Washington 5, D. C.

STATE OF SOUTH CAROLINA)
) SS:
County of Charleston)

CLARENCE STUDEMEYER, being first duly sworn on his oath, deposes and says; that he is the plaintiff in the above entitled action, and that he has read the within and foregoing complaint and knows the contents thereof, and that the facts therein stated on personal knowledge are true, and those stated on information and belief he believes to be true.

/s/ Clarence Studemeyer
CLARENCE STUDEMEYER
Plaintiff

Subscribed and sworn to before me this 9th day of March, 1962.

/s/ Paul N. Uricchio, Jr.
NOTARY PUBLIC in and for the County of CHARLESTON, STATE OF SOUTH CAROLINA

My commission expires:
at the pleasure of the Governor.

Filed June 21, 1962

* * * *

ANSWER

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

Answering specifically the numbered paragraphs of the complaint, the defendants aver as follows:

1. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the complaint.

2. 3. 4. 5. 6. 7. Defendants admit the allegations of paragraphs 2, 3, 4, 5, 6 and 7.

8. The defendants admit that the plaintiff received on September 29, 1960, a notice of proposed removal signed by Lt. Col Harry P. Cousans, Commander of the 1608th Civil Engineering Squadron at the Charleston Air Force Base, Charleston, South Carolina, which notice contained certain charges or reasons for the proposed removal. Further answering the defendants deny the remaining allegations of paragraph 8.

9. The defendants admit that the plaintiff was entitled to the benefits of the Veterans Preference Act and that he made a timely appeal to the Fifth United States Civil Service Region. Defendants further admit that a hearing was held, but deny that this hearing was "pretended." Answering further, the defendants have no information concerning the plaintiff's allegation that he demanded a stenographer be present to take down the testimony at the hearing in the Fifth Civil Service Region. The remaining allegations of paragraph 9 are denied.

10. The defendants admit the allegations contained in paragraph 10 except that they say that the final decision of the Board of Appeals and Review was rendered on June 30, 1961, instead of on February 2, 1962, as plaintiff alleges.

11. 12. The defendants deny the allegations of paragraphs 11 and 12.

Third Defense

The Court lacks jurisdiction to award the plaintiff back pay.

Fourth Defense

The complaint is barred as the plaintiff is guilty of laches.

Fifth Defense

The plaintiff is not entitled to judgment as in the administrative proceedings there was no substantial departure from applicable procedures, no misconstruction of governing legislation, nor any like error going to the heart of the administrative determination involved in this action.

/s/ David C. Acheson
DAVID C. ACHESON
United States Attorney

• • • •

Filed July 24, 1962

* * * *

MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff in the above-entitled case and moves the Court for a summary judgment in his favor upon the grounds and for the reason that there is no genuine issue of fact in this case, and that the plaintiff is entitled to judgment as a matter of law.

This motion is predicated upon the verified complaint and the affidavit of the plaintiff hereto attached.

/s/ Claude L. Dawson
CLAUDE L. DAWSON
Attorney for the plaintiff
1049 Shoreham Bldg.
Washington 5, D. C.

* * * *

Filed July 24, 1962

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF SOUTH CAROLINA)
) SS:
County of Charleston)

CLARENCE STUDEMEYER, being first duly sworn according to law, upon his oath deposes and says; That he is the plaintiff in the above-entitled action, and that he makes this affidavit in support of his motion for a summary judgment in this cause.

Affiant says that on September 29, 1960, and while he was employed as a Foreman in the Plumbing Shop, Charleston Air Force Base, Charleston, South Carolina certain alleged and pretended charges were filed against him "Notice of Proposed Removal" which said charges were made by one Harry P. Cousans, a Lt. Colonel. That the affiant at the time was a civil service employee of the United States with veterans preference having honorably served the government of the United States during the period of World War II, and that pursuant to Section 14 of the Veterans Preference Act of June 27, 1944 (5 USC 863) he made a demand for a personal hearing on the said charges before the Commanding Officer of the said Air Force Base where he was employed, but the said request for a personal hearing was in all things denied, and that thereafter on November 1, 1960 the said alleged and pretended charges against him were approved by the same man who had made them, the said Harry P. Cousans, as Lt. Colonel, and that the said Colonel acted in the capacity of an accuser, prosecutor, judge and executioner, and that the affiant did not receive a fair and impartial hearing on the said alleged and pretended charges by the officials of the Charleston Air Force Base.

Affiant says that in the letter of charges filed against him it was stated that he had installed a water line to

the truck refueling stand, and that as a matter of fact there is no water line to the truck refueling stand.

Affiant further alleges that pursuant to said Section 14 of the Veterans Preference Act, supra, he duly appealed his illegal discharge from his government position to the United States Civil Service Commission, and thereafter an alleged and pretended hearing was held before the officials of the Fifth Regional Office of the United States Civil Service Commission of Atlanta, Georgia, at Charleston, South Carolina. Affiant says that at this said hearing he demanded the right to have a competent stenographer present to take the testimony, and offered to pay for the services of said stenographer, but that this request was in all things denied and that no proper record was made of the evidence adduced at the said hearing.

Affiant says that the hearing held at Charleston, South Carolina, he requested that the following persons attend the hearing for the purpose of testifying in his behalf.

Lt. Louis L. Clipp	Kenneth H. Owen, A/1c
M/Sgt. Luther J. Bartlett	William J. Donovan, Civ.
Walter A. Porter, A/1c	John M. Dunning, Civ.
Charles P. Stancil, A/1c	Harry P. Cousans, Lt. Col.
Gary W. Stanfield, A/2c	W. D. Henderson, S/Sgt.
Ollie B. Miller, A/1c	

Affiant says that William J. Donovan and John M. Dunning were civil service employees of the United States, and at that time there was a lawful order in effect from the Chairman of the United States Civil Service Commission requiring civil service employees, when requested, to be present at the hearing in charges filed against another civil service employee such as this affiant. Despite the request for the presence of the said witnesses above enumerated, none of them appeared at the hearing, and the request for their presence was denied. Affiant further says that all of the persons above-named were physically present in Charleston at the time of his said hearing and

could have, if they had been ordered, attended the hearing in his case.

Affiant says that Peyton C. Hartley, the chairman at the said alleged and pretended hearing before the Fifth Regional Office of the Civil Service Commission at Atlanta, Georgia, was the same and identical person who had investigated the charges against the plaintiff, and that he was neither a fit nor proper person to conduct the hearing, and that the affiant did not receive a fair or a proper hearing before the Regional Office of the Civil Service Commission at Atlanta, Georgia.

Affiant further says that the decision of the Director of the Fifth Regional Office of the Civil Service Commission was adverse to him, and that thereafter affiant in due and timely course appealed the said decision to the Board of Appeals and Review of the United States Civil Service Commission in Washington, D. C., and that an adverse decision was rendered by the said Board of Appeals and Review. That thereafter the affiant requested the Commissioners of the United States Civil Service Commission to review his case as is permitted under the regulations of the said Civil Service Commission, but his appeal in this regard was finally decided adverse to him on February 2, 1962. That the appeal of the affiant to the United States Civil Service Commission was continuously under consideration by the said Commission until February 2, 1962, and that affiant attaches hereto a true and correct copy of the final decision.

Affiant alleges that he was illegally and unlawfully separated from his position and grade of Foreman in the Plumbing Shop at the Charleston Air Force Base, Charleston, South Carolina.

/s/ Clarence Studemeyer
CLARENCE STUDEMEYER
Plaintiff

Subscribed and sworn to before me this 18th day of July, 1962.

/s/ Charles A. Rush
NOTARY PUBLIC, in and for the County of Charleston, STATE OF SOUTH CAROLINA.

My commission expires:
Pleasure of the Governor

TRUE COPY

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

Feb 2 - 1962

Mr. Claude L. Dawson
Attorney at law
1049 Shoreham Bldg.
15th & H Streets, N.W.
Washington 5, D. C.

Dear Mr. Dawson:

This is in further reference to your letter of July 14, 1961, and subsequent correspondence requesting that the Commissioners reopen and reconsider the Section 14, Veterans Preference Act case of Mr. Clarence Studemeyer.

The Commissioners have given careful consideration to your request, particularly to the court decisions cited in support thereof and to all representations submitted in Mr. Studemeyer's behalf. The Commissioners have found that the current representations do not demonstrate probable error in the previous decision of the Board of Appeals and Review and that no facts or arguments have been presented that warrant reopening of the Section 14 Veterans Preference Act case. The request is accordingly denied. The decision of the Board dated June 30, 1961 remains as the final decision of the Commission, and Mr. Clarence Studemeyer's administrative remedies within the Commission were thereby exhausted.

By direction of the Commission:

Sincerely yours,

/s/ Mary V. Wenzel
MARY V. WENZEL
Executive Assistant
to the Commissioners

Filed August 1, 1962

* * * *

MOTION TO DISMISS OR IN THE ALTERNATIVE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Come now the defendants by and through their attorney, the United States Attorney for the District of Columbia, and move this Court to dismiss the complaint on the ground that it fails to state a claim upon which relief can be granted, or

In the alternative the defendants move for summary judgment in this action on the ground that there exists no genuine issue of material fact and that the defendants are entitled to judgment as a matter of law.

Attached hereto and made a part hereof are certified copies of the official documents of the Department of the Air Force which pertain to this case, identified as Government Exhibits A through N; certified copies of the official documents of the United States Civil Service Commission which pertain to this case identified as Government Exhibits 1 through 45; the affidavit of Autice M. Taylor, the Civilian Personnel Officer, Charleston Air Force Base, South Carolina, identified as Government Exhibit 46; and the affidavit of W. P. Foxworth, identified as Government Exhibit 47.

/s/ David C. Acheson
DAVID C. ACHESON
United States Attorney

* * * *

Filed September 28, 1962

* * * *

ORDER

Upon consideration of the plaintiff's motion for summary judgment, the defendants' motion to dismiss or in the alternative the defendants' cross-motion for summary judgment, the argument of counsel in Open Court, and it appearing to the Court that there exists no genuine issue of material fact and that the defendants are entitled to judgment as a matter of law, it is by the Court this 28th day of September, 1962,

ORDERED

1. That the plaintiff's motion for summary judgment be and the same hereby is denied.

2. That the defendants' cross-motion for summary judgment be and the same hereby is granted and the complaint herein be and the same hereby is dismissed with prejudice.

(Signed) Leonard P. Walsh
United States District Judge

Notice of Appeal filed October 31st, 1962

Filed March 23, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 959-62

WOODROW STUDEMEYER, 1305 Wondo Road, North Charleston, South Carolina,
Plaintiff,

v.

JOHN W. MACY, JR., Chairman, U. S. Civil Service Commission, Washington, D. C.

FREDERICK J. LAWTON, Member, U. S. Civil Service Commission, Washington, D. C.

ROBERT E. HAMPTON, Member, U. S. Civil Service Commission, Washington, D. C.

and

EUGENE M. ZUCKERT, Secretary of the Air Forces, of the United States, Washington, D. C.
Defendants.

SUIT BY A VETERAN PREFERENCE ELIGIBLE FOR AN ORDER ADJUDICATING HIS RIGHTS AS A GOVERNMENT EMPLOYEE OF THE UNITED STATES, AND FOR A MANDATORY INJUNCTION REQUIRING THE SAID DEFENDANTS TO RESTORE HIM TO HIS RIGHTFUL POSITION IN GOVERNMENT SERVICE OF THE UNITED STATES, AND FOR SUCH OTHER AND FURTHER RELIEF THAT TO THE COURT MAY APPEAR TO BE EQUITABLE AND JUST.

The plaintiff for his cause of action complains of the defendants, and alleges:

1. That the plaintiff is a citizen of the United States and a resident of the State of South Carolina, and that the value of the objective of this action exceeds the sum of Ten Thousand Dollars exclusive of interest and costs.

2. That the said defendant, John W. Macy, Jr., is the duly appointed, acting and qualified Chairman of the United States Civil Service Commission, and is sued in that capacity only.

3. That the defendant, Frederick J. Lawton, is a duly appointed, acting and qualified member of the United States Civil Service Commission, and is sued in that capacity only.

4. That the defendant, Robert E. Hampton, is a duly appointed, acting and qualified member of the United States Civil Service Commission, and is sued in that capacity only.

5. That the defendant, Eugene M. Zuckert, is the duly appointed, acting and qualified Secretary of the Air Forces of the United States, and is sued in that capacity only.

6. That the said defendants, John W. Macy, Jr., Frederick J. Lawton, and Robert E. Hampton, constitute the sole membership of the United States Civil Service Commission, and that they are charged by law with the Administration of the so-called Civil Service laws of the United States relating to employees of the United States, and that among other things that they are charged with the proper administration of the Veterans Preference Acts, namely the Act of June 27, 1944, and its amendments, and that it is their duty to honestly and fairly administer all laws under which they are authorized to operate.

7. The plaintiff alleges that the said defendant, Eugene M. Zuckert, in his official capacity as Secretary of the Air Forces is charged by law with the employment, retention, and discharge of all civilian employees under his Department wherever located, and particularly the employees of the United States employed at the Charleston Air Force Base located at Charleston, South Carolina.

The plaintiff alleges in this connection that the said defendant, Eugene M. Zuckert, in his official capacity does not have an absolute right to employ, retain, or discharge any employee he may desire, but that at all times he is subject to all of the provisions of the laws commonly known as the Civil Service laws of the United States, the lawful regulations of the United States Civil Service Commission, the Executive orders of the President of the United States, and the provisions of the Veterans Preference Act of June 27, 1944, and its amendments, and the lawful regulations issued pursuant to such Act.

8. The plaintiff alleges that while employed in the capacity of an Aircraft Freight Loader at the Charleston Air Force Base located at Charleston, South Carolina, on October 17, 1960 certain alleged and pretended charges were filed against the plaintiff by Lt. Colonel Everett M. Hockwald alleging that the plaintiff had been guilty of insubordination because on October 12, 1960 while the plaintiff was helping with the unloading of lettuce from a truck, and while he had a case of lettuce in his hands, he did not within five seconds from the time he was ordered pick up a crate of lettuce which had fallen from the truck which the plaintiff was in the process of doing when he was then and there charged with insubordination and ordered to report to the air forces officers.

9. Plaintiff alleges that in accordance with the provisions of Section 14 of the Veterans Preference Act of June 27, 1944 (5 U.S.C. 863) he demanded a personal hearing on said charges before the Commanding Officer of the Charleston Air Force Base, but his demand was in all things denied.

10. The plaintiff further alleges that on November 9, 1960 he was discharged from his governmental position effective November 18, 1960 by the said Lt. Colonel Everett M. Hockwald who acted in the capacity of an accuser, prosecutor, judge, and executioner, and that the

plaintiff who was separated from his governmental position on November 18, 1960 did not receive a fair or a proper hearing before the officials of the Charleston Air Force Base.

11. The plaintiff alleges that as a veteran preference eligible, as that term is defined in Section 2 of the Veterans Preference Act of June 27, 1944 (5 U.S.C. 851) he duly and timely appealed to the United States Civil Service Commission at its Regional Office located at Atlanta, Georgia, and an alleged and pretended hearing was held by one Peyton C. Hartley, investigator of said Commission, and that at such hearing the plaintiff demanded that a proper shorthand stenographer be present to take down the testimony at such hearing but this request was in all things denied. The plaintiff further alleged that the said Peyton C. Hartley was the same and identical person who had made the investigation of the charges against the plaintiff, and who had obtained affidavits which were considered as evidence in the matter of the plaintiff's appeal, and that he was not a proper or qualified official to conduct the hearing and to make his report on the evidence, and that the plaintiff did not receive a fair or proper hearing before the Regional Office of the Civil Service Commission at Atlanta, Georgia.

12. Plaintiff alleges that despite the proof he adduced before the Regional Office of the Civil Service Commission for the Fifth Region, the charges against him were in all things affirmed. Plaintiff thereupon alleges that he appealed to the Board of Appeals and Review of the United States Civil Service Commission in Washington, D. C., and said charges against him were again affirmed, and that he has now fully exhausted all administrative remedies that he may have had by an adverse decision of February 2, 1962, and that unless this Court grants the relief asked by this action, plaintiff will be without remedy.

13. Plaintiff asserts the following procedural errors in all of the proceedings herein noted which resulted in his dismissal from his governmental position.

1. Charges were filed against him by Lt. Colonel Everett M. Hockwald, who acted in the capacity of an accuser, prosecutor, judge and executioner to carry out his charges and to dismiss the plaintiff.

2. That on information and belief the plaintiff alleges that the said Lt. Colonel Everett M. Hockwald did not have authority either to employ or discharge employees of the United States such as this plaintiff.

3. That the plaintiff was denied a personal hearing before the Commanding Officer of the Charleston Air Force Base as may be demanded in accordance with Section 14 of the Veterans Preference Act of June 27, 1944.

4. That Peyton C. Hartley conducted the investigation on said charges and was not a proper or qualified official to conduct the hearing on the said charges or the Fifth Regional Office of the United States Civil Service Commission.

5. That the refusal to permit a proper and competent stenographer to take down the testimony at the hearing before Peyton C. Hartley deprived the plaintiff of a fair and impartial hearing.

14. Plaintiff alleges that he was illegally and unlawfully separated from his governmental position on November 18, 1960, and that this Court in the interest of right and justice should order the said defendants to restore him retroactively to his proper grade and position in governmental service as of the date of his illegal and unlawful separation from his governmental position.

WHEREFORE, the Plaintiff prays:

1. That due process issue directed to the said defendants, and each of them, commanding them to appear and answer this complaint.

2. That the Court decree and declare that the plaintiff's separation from his governmental position was illegal, and that the Court issue a mandatory injunction directed to the said defendants commanding and requiring them to restore the plaintiff to his position and grade in the service of the United States retroactively as of the date of his illegal and unlawful discharge, together with all rights, benefits and privileges flowing from a continuity of such service from the date of his reinstatement to the date of judgment.

3. That the plaintiff have such other and further relief as to the Court may appear to equitable and just.

/s/ Woodrow Studemeyer
WOODROW STUDEMEYER,
Plaintiff.

/s/ Claude L. Dawson
CLAUDE L. DAWSON
Attorney for the Plaintiff,
1049 Shoreham Building,
Washington 5, D. C.

STATE OF SOUTH CAROLINA)
) SS:
County of Charleston)

WOODROW STUDEMEYER, being first duly sworn on his oath deposes and says that he is the plaintiff in the the above-entitled action, and that he has read the within and foregoing complaint and knows the contents thereof, and that the facts therein stated on personal knowledge are true, and those stated on information and belief he believes to be true.

/s/ Woodrow Studemeyer
WOODROW STUDEMEYER,
Plaintiff.

Subscribed and sworn to before me this 28th day of February, 1962.

/s/ Paul N. Uricchio, Jr.
NOTARY PUBLIC, in and for the County of CHARLESTON, STATE OF SOUTH CAROLINA

My commission expires:
At the pleasure of the Governor of South Carolina.

Filed June 22, 1962

* * * *

ANSWER

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

Answering specifically the numbered paragraphs of the complaint, the defendants aver as follows:

1. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the complaint.

2. 3. 4. 5. 6. and 7. The defendants admit the allegations of paragraphs 2, 3, 4, 5, 6 and 7.

8. The defendants admit that the plaintiff was employed at the Charleston Air Force Base, Charleston, South Carolina, as an aircraft freight loader and that he received on October 17, 1960, a notice of proposed removal signed by Lt. Col. Everett M. Hockwald. Further answering, the defendants deny the remaining allegations of paragraph 8 except that they admit that the plaintiff's notice of proposed removal was predicated on insubordination.

9. The defendants admit that the plaintiff was entitled to the benefits of the Veterans Preference Act. Further answering, the defendants deny the remaining allegations of paragraph 9.

10. The defendants admit that by letter dated November 9, 1960, a decision was reached which resulted in the removal of the plaintiff, effective November 18, 1960. Further answering, the defendants deny the remaining allegations of paragraph 10.

11. The defendants admit that the plaintiff made timely appeal to the Fifth United States Civil Service Region and that a hearing was held, but deny that this hearing

was "pretended." Answering further, the defendants have no information concerning plaintiff's allegation that he demanded that a stenographer be present to take down testimony at the hearing. The remaining allegations of paragraph 11 are denied.

12. The defendants admit that the Fifth United States Civil Service Region sustained the action of the Air Force and that the plaintiff made timely appeal to the Board of Appeals and Review of the United States Civil Service Commission in Washington, D. C. The defendants admit that the Board of Appeals and Review affirmed the finding of the Fifth United States Civil Service Region. The defendants admit that the plaintiff has exhaused all administrative remedies, but they say that the final decision of the Board of Appeals and Review was rendered on June 30, 1961, instead of on February 2, 1962, as the plaintiff alleges.

13. and 14. The defendants deny the allegations of paragraphs 13 and 14.

Third Defense

The Court lacks jurisdiction to award the plaintiff back pay.

Fourth Defense

The complaint is barred as the plaintiff is guilty of laches.

Fifth Defense

The plaintiff is not entitled to judgment as there were no substantial departures from applicable procedures in the administrative proceedings, no misconstruction of governing legislation, and no error going to the heart of the administrative determination involved in this action.

/s/ David C. Acheson
DAVID C. ACHESON
United States Attorney

• • • •

Filed July 17, 1962

* * * *

MOTION FOR SUMMARY JUDGMENT

Come now the defendants by their attorney, the United States Attorney, and move this Court for summary judgment in this cause for the reason that there exists no genuine issue of material fact and that the defendants are entitled to judgment as a matter of law.

Attached hereto and made a part hereof are certified copies of the official documents of the Department of the Air Force which pertain to this case, identified as Government Exhibits A through J; and certified copies of the official documents of the Civil Service Commission which pertain to this case, identified as Government Exhibits 1 through 35.

/s/ David C. Acheson
DAVID C. ACHESON
United States Attorney

* * * *

Filed July 24, 1962

* * * *

MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff in the above-entitled case and moves the Court for a summary judgment in his favor upon the grounds and for the reason that there is no genuine issue of fact in this case, and that the plaintiff is entitled to judgment as a matter of law.

This motion is predicated upon the verified complaint and the affidavit of the plaintiff attached hereto.

/s/ Claude L. Dawson
CLAUDE L. DAWSON
Attorney for the Plaintiff
1049 Shoreham Bldg.
Washington 5, D. C.

* * * *

Filed July 24, 1962

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 959-62

WOODROW STUDEMEYER, *Plaintiff*,

v.

JOHN W. MACY, JR., Chairman, U. S. Civil Service Commission, et al., *Defendants*.

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF SOUTH CAROLINA)
) ss:
County of Charleston)

WOODROW STUDEMEYER, being first duly sworn according to law, upon his oath deposes and says; That he is the plaintiff in the above-entitled action, and that he makes this affidavit in support of his motion for a summary judgment in this cause.

Affiant says that on October 17, 1960, and while he was employed as an Aircraft Freight Loader at the Charleston Air Force Base located at Charleston, South Carolina. certain alleged and pretended charges were filed against him by one Lt. Colonel Everett M. Hockwald. It was alleged that the affiant had been guilty of insubordination because on October 12, 1960 while he was helping with the unloading of lettuce from a truck, and while he had a case of lettuce in his hands, he did not within five seconds from the time he was ordered to pick up a crate of lettuce which had fallen from the truck which the affiant was in the process of doing when he was then and there

charged with insubordination and ordered to report to the air forces officers.

Affiant says that at the time he was a permanent civil service employee of the United States with veterans preference.

Affiant says that immediately after receiving notice of the proposal to discharge him from his governmental position, and in accordance with Section 14 of the Veterans Preference Act of June 27, 1944 (5 USC 863), he made a demand for a personal hearing before the Commanding Officer of the Charleston Air Force Base, but that the said personal hearing was in all things denied. Affiant further says that he was discharged from his governmental position on November 9, 1961 effective November 18, 1961 by the said Lt. Colonel Everett M. Hockwald who acted in the capacity of an accuser, prosecutor, judge and executioner, and that he did not receive a fair or proper hearing before the officials of the Charleston Air Force Base. Affiant further says that on information and belief that the said Lt. Colonel Everett M. Hockwald did not have proper authority to discharge him from his governmental position for the reason that he did not have the power of appointment which carries with it the right to discharge an employee.

Affiant further says that in accordance with Section 14 of the Veterans Preference Act, supra, he duly appealed his discharge from his governmental position to the Fifth Regional Office of the United States Civil Service Commission at Atlanta, Georgia, and thereafter a hearing was held in Charleston, South Carolina pursuant to his appeal. That at such hearing the affiant demanded that a proper shorthand stenographer be present to take down the testimony, and this request was denied despite the fact that affiant offered to pay for the services of said stenographer. Affiant further says that the hearing was held before one

Peyton C. Hartley who was the same and identical person who had made the investigation of the charges against the affiant and who had obtained affidavits from witnesses which were considered as evidence at the said hearing, and that the said Peyton C. Hartley was not a fit nor proper person to conduct a hearing because he had previously acted in the capacity of an investigator.

Affiant further says that the decision of the Fifth Regional Office for the United States Civil Service Commission at Atlanta, Georgia was adverse to him, and that thereafter he duly appealed to the Board of Appeals and Review of the Civil Service Commission in Washington, D.C. and an adverse decision was rendered against him, and thereafter the affiant requested the Commissioners of the Civil Service Commission to take jurisdiction in his appeal but that his request was in all things denied on February 2, 1962.

Affiant says that from the time that he took his appeal to the Regional Office of the Civil Service Commission at Atlanta, Georgia until February 2, 1962 his appeal was continually under consideration by the United States Civil Service Commission. That affiant prior to the bringing of this action fully exhausted any administrative right of appeal that he had.

Affiant attaches hereto a copy of the decision from the Commissioners of the Civil Service Commission dated February 2, 1962.

/s/ Woodrow Studemeyer
WOODROW STUDEMEYER
Plaintiff

Subscribed and sworn to before me this 18 day of July, 1962.

/s/ Charles A. Rush
NOTARY PUBLIC in and for the County of Charleston, STATE OF SOUTH CAROLINA.

My commission expires:
Pleasure of the Governor.

TRUE COPY

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

Feb. 2, 1962

Mr. Claude L. Dawson
Attorney at Law
Shoreham Building
15th & H Street, N. W.
Washington 5, D. C.

Dear Mr. Dawson:

This is in further reference to your letter of July 14, 1961, and subsequent correspondence requesting that the Commissioners reopen and reconsider the Section 14, Veterans' Preference Act case of Mr. Woodrow Studemeyer.

The Commissioners have given careful consideration to your request, particularly to the court decisions cited in support thereof. The Commissioners have found that the current representations do not demonstrate probable error in the previous decision of the Board of Appeals and Review and that no facts or arguments have been presented that warrant a reopening of Mr. Studemeyer's Section 14, Veterans' Preference Act case. Your request is accordingly denied. The decision of the Board dated June 30, 1961, remains as the final decision of the Commission, and Mr. Studemeyer's administrative remedies within the Commission were thereby exhausted.

By direction of the Commission:

Sincerely yours,

/s/ Mary V. Wenzel
MARY V. WENZEL
Executive Assistant
to the Commissioners

Filed September 28, 1962

* * * *

ORDER

Upon consideration of the defendants' motion for summary judgment, the opposition thereto, the plaintiff's motion for summary judgment, the argument of counsel in Open Court, and it appearing to the Court that there exists no genuine issue of material fact and that the defendants are entitled to judgment as a matter of law, it is by the Court this 28th day of September, 1962,

ORDERED

1. That the plaintiff's motion for summary judgment be and the same hereby is denied.

2. That the defendants' motion for summary judgment be and the same hereby is granted and the complaint herein be and the same hereby is dismissed with prejudice.

(Signed) Leonard P. Walsh
United States District Judge

Notice of Appeal filed October 31, 1962.

BRIEF FOR APPELLEE AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17464

CLARENCE STUDEMEYER, APPELLANT

v.

JOHN W. MACY, JR., CHAIRMAN, UNITED STATES CIVIL SERVICE COMMISSION, ET AL., APPELLEES

No. 17465

WOODROW STUDEMEYER, APPELLANT

v.

JOHN W. MACY, JR., CHAIRMAN, UNITED STATES CIVIL SERVICE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT B. NORRIS,
BARRY I. FREDERICKS,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

CLARENCE STUDEMEYER

1. Was appellant dismissed according to the proceedings set forth in the Veterans Preference Act of 1944 (5 U.S.C. 863)?
2. Was appellant afforded an opportunity to have a personal "hearing" before the "head of the agency"?
3. Were appellant's procedural rights violated by failure of the Air Force to produce requested witnesses before the hearing held by the Fifth Regional Office of the Civil Service Commission?

WOODROW STUDEMEYER

4. Was appellant removed in accordance with the procedures set forth in the Veterans Preference Act of 1944 (5 U.S.C. 863)?
5. Was appellant afforded ample opportunity to have a personal "hearing" before the "head of the agency"?

INDEX

TABLE OF CASES

OTHER REFERENCES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17464

CLARENCE STUDEMEYER, APPELLANT

v.

JOHN W. MACY, JR., CHAIRMAN, UNITED STATES CIVIL SERVICE COMMISSION, ET AL., APPELLEES

No. 17465

WOODROW STUDEMEYER, APPELLANT

v.

JOHN W. MACY, JR., CHAIRMAN, UNITED STATES CIVIL SERVICE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE AND APPENDIX

STATEMENT OF PROCEEDINGS BELOW

This is a consolidated appeal from orders of the District Court granting appellee summary judgment and dismissing appellants' complaint. Appellants sought declaratory judgment for reinstatement from their dismissal as employees of the United States Air Force. Appellants were afforded a full hearing before the Fifth Regional Office of the Civil Service Commission and took an appeal from the decision of the Regional Office to the Board of Appeals and Review of the Civil Service Commission. Both bodies upheld the propriety of the appellants' removal.

COUNTERSTATEMENT OF THE CASE

(CLARENCE STUDEMEYER)

As of September 29, 1960, appellant Clarence Studemeyer was a civilian employee of the Department of the Air Force. He was employed at Charleston Air Force Base, Charleston, South Carolina, as a Plumber-Foreman. Appellant was in the competitive civil service and was entitled to all benefits of the Veterans Preference Act of 1944, as amended (5 U.S.C. 863).

On September 29, 1960, appellant was informed by letter from Lt. Col. Harry P. Cousans, Commander of the 1608th Civil Engineering Squadron, that it was proposed that he be removed from his position because of (1) the misuse of Government manpower and materials, (2) falsification of official records and (3) refusal to cooperate in an official investigation (R.A.P. September 29, 1960).[1] The notice letter of September 29, 1960, specifically set forth ten separate reasons in support of the charges made against appellant. Appellant was advised that he could answer these charges in person and in writing (R.A.P. September 29, 1960). On September 17, 1960, appellant replied to the notice letter. He denied each of the charges and requested "a hearing before the head of the agency." (R.A.P. October 17, 1960) On October 19, 1960, appellant was informed that the term "head of the agency" was ambiguous. However, he was advised that Lt. Col. Cousans would be available to discuss or explain all parts of the charges being brought against him and that no final decision would be made until after October 24, 1960. (Appendix 1A) Appellant's attorney Paul N. Uricchio, Jr., wrote Col. Cousans that he assumed the Base Commander was the "head of the agency," and requested that a hearing be held prior to a final decision as to appellant's removal. (R.A.P. October 29, 1960) On October 26, Col. Wilston Ralston wrote Mr. Uricchio and informed him that he would "be glad to interview Mr. Studemeyer concerning the case in the presence of his representative on Friday, 28 October, 1960 at 9 o'clock." (Appendix 2A) Appellant neither appeared nor made further reply with re-

[1] R.A.P. refers to Record of Administrative Proceedings. The dates are dates which appear on the documents.

spect to his request for a personal "hearing." (Appendix 3A)

On November 1, 1960, appellant's service with the Air Force was terminated. In the decisional letter he was informed that although he had not made oral reply, his letter of October 16, 1960 was considered; that Col. Cousans concluded that the charges contained in the notice letter of September 29, 1960, were fully supported by the evidence and that appellant's removal would promote the efficiency of the service. Appellant's removal was to become effective as of November 30, 1960. He was further advised of his right to appeal through either the Air Force Grievance Procedure or to the Fifth Regional Office of the United States Civil Service Commission. (R.A.P. November 1, 1960) On November 2, 1960, appellant filed a request for appeal with the Fifth Regional Office. On November 28, 1960, he wrote to the civilian personnel officer of the Charleston Air Force Base requesting that certain individuals attend the hearing to be held by the Civil Service Commission on December 9, 1960 (R.A.P. November 28, 1960). Appellant made no effort to insure the appearance of these requested witnesses at the hearing. (Appendix 4A) On December 9, 1960, a hearing was held by the Fifth Regional Office and on February 7, 1961, the Regional Office of the Civil Service Commission found that the charges against the appellant were sustained and that the action taken by the Air Force was for such cause as to promote the efficiency of the service. Appellant was further advised that he could appeal the decision to the Board of Appeals and Review of the United States Civil Service Commission. (Appendix 4A, 6A, R.A.P. February 7, 1961).

On February 14, 1961, appellant appealed the decision of the Fifth Regional Office to the Board of Appeals and Review. He subsequently filed a memorandum stating therein his basis for appeal. On June 3, 1961, the Board of Appeals and Review affirmed the decision of the Fifth Regional Office and

> "determined that sustained charges were sufficiently serious to warrant the [removal] action taken. The adverse action was not considered arbitrary or capricious but was considered as for such cause as to promote the efficiency of the service." (R.A.P. June 30, 1961)

Appellant filed a request for reconsideration which was denied by the Board of Review (R.A.P. September 5, 1961).

On March 20, 1962, appellant filed an action in the District Court for the District of Columbia. Upon proper motion the District Court granted appellee summary judgment on September 28, 1962. Notice of Appeal was filed on October 31, 1962, and the instant appeal followed.

COUNTERSTATEMENT OF THE CASE

(WOODROW STUDEMEYER)

As of October 17, 1960, appellant Woodrow Studemeyer was a civilian employee of the Department of the Air Force at the Charleston Air Force Base, Charleston, South Carolina. He was employed as an Air Craft Freight Loader, with the 1608th Air Terminal Squadron. Appellant was in the competitive Civil Service and entitled to all of the benefits of the Veterans Preference Act of 1944, as amended (5 U.S.C. 863).

On October 17, 1960, appellant was notified by his Commanding Officer, Lieutenant Colonel Edward M. Hackwold of the 1608th Air Terminal Squadron, that it was proposed that he be removed from his position with the Air Force. The specific reason for his proposed removal was insubordination, substantiated by the fact that he had been disciplined over the preceding years. Appellant was further advised that he could answer these charges in person and in writing. (R.A.P. October 17, 1960).

On October 21, 1960, appellant replied to the notice of proposed removal. He denied all of the charges set forth in the notice letter and requested "a hearing before the head of the agency" (R.A.P. October 21, 1961). On October 27, 1960, appellant was advised that Lieutenant Colonel E. M. Hockwold would be available to discuss his case with him. (Appendix 7A). Appellant neither personally contacted Lieutenant Colonel Hockwold nor filed any additional requests for a per-

sonal "hearing" (Appendix 9A). On November 9, 1960, appellant was informed that the charges of insubordination were sustained and that his removal was necessary in order to promote the efficiency of the service. It was thereupon decided that appellant would be removed from his position as of November 18, 1960. Appellant was further advised of his right to appeal the decision of the removal to the Fifth Regional Office of the U.S. Civil Service Commission (R.A.P. November 18, 1960).

On November 15, 1960, appellant filed an appeal with the Fifth Regional Office. A hearing was held before the Fifth Regional Office on December 12, 1960. On January 19, 1961, the Fifth Regional Office concluded that the procedural requirements had been complied with, that the charges of insubordination were sustained and that the action taken to remove appellant was for such cause as would promote the efficiency of the service (R.A.P. January 19, 1961). Appellant was further advised that he could appeal the decision of the Fifth Regional Office to the Board of Appeals and Review of the United States Civil Service Commission.

On January 27, 1961, appellant filed an appeal with the Board of Appeals and Review. After reviewing the record before it, the Board found that the charges of insubordination, considered along with the elements of appellant's past disciplinary record, were sufficient to justify his removal. The Board therefore affirmed the decision of the Fifth Regional Office (R.A.P. June 30, 1961). Appellant requested that the Board review its decision; this request was denied. (R.A.P. February 2, 1962)

On March 23, 1962, appellant filed an action for declaratory judgment in the District Court for the District of Columbia. On July 17, 1962, appellee filed a motion for summary judgment, which was granted by the District Court on September 28, 1962. Notice of Appeal was filed on October 31, 1962, and the instant appeal followed.

STATUTE AND RULE INVOLVED

Title 5, United States Code, Section 863, provides:

> *Discharge, suspension, etc., only for cause; reason in writing; advance notice; personal appearance; findings and recommendations.*
>
> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and

shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further*, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title.

Section 1, Air Force Manual 40, provides in part:

4. POLICY. It is the basic policy of the Air Force that authority and responsibility for effecting civilian personnel actions be vested in commanding officers of installations maintaining central civilian personnel offices. In the interest of efficiency and economy the functions of civilian personnel administration at an installation will be consolidated and carried out through one central civilian personnel office. Based on the concept that the personnel program is an integral part of overall management, the civilian personnel office will assist supervisors and operating officials in effecting a sound program of employee-management relations and in solving personnel problems.

5. DELEGATION OF AUTHORITY. Commanding officers of installations at which central civilian personnel offices are established are authorized and directed, in accordance with current statutory, regulatory, policy, program, and procedural requirements and standards, to:

a. Allocate positions to appropriate grades so that employees are compensated equitably.

b. Appoint, assign, promote and demote, compensate, and separate civilian employees.

c. Operate programs which will insure:

(1) Sound management of civilian personnel as an integral part of the Air Force military-civilian team.

(2) Assignment of employees to essential jobs for which they are fitted best by aptitude and experience.

(3) Effective training and supervision which will result in the development and maintenance of a high

degree of employee morale and an efficient and productive work force.

(4) Maintenance of essential employee services and a continuing work environment conducive to good employee-management relationships.

(5) Stimulation and recognition of employee accomplishment through effective promotion and administration of the incentive programs.

(6) Continuing information to employees concerning their responsibilities and obligations as Federal employees and their privileges and rights, including their rights of appeal and the applicable procedures for requesting review of grievances and complaints.

SUMMARY OF ARGUMENT

(CLARENCE STUDEMEYER)

I.

Appellant's commanding officer had the authority to remove him from his position with the Air Force. Appellant was removed according to the procedures prescribed by the Veterans Preference Act of 1944 (5 U.S.C. 863). No authority holds that in an employee-discharge case there must be a separation of functions similar to the separation of powers which exists in the National Government.

II.

The record clearly shows that appellant was given every opportunity to have a personal "hearing" before the "head of the agency" and therefore his contention that he was denied such a "hearing" is frivolous.

III.

Appellant was not denied procedural due process because the Air Force failed to produce requested witnesses at the Civil Service Commission hearing. Appellant did not take upon himself "the initial burden" of producing these witnesses which he is required.

(WOODROW STUDEMEYER)

IV.

Appellant Woodrow Studemeyer was dismissed in accordance with the procedures set down by the Veterans Preference Act of 1944 (5 U.S.C. 863).

V.

Appellant was given ample opportunity to afford himself a personal "hearing" before the proper "head of the agency." He did not avail himself of the opportunity and therefore can claim no violation of his procedural rights.

ARGUMENT

I.

(CLARENCE STUDEMEYER)

Appellant was removed in conformity with procedures prescribed by the Veterans Preference Act of 1944

Appellant, Clarence Studemeyer, contends without revelant authority that he was improperly dismissed from his position with the Air Force because his Commanding Officer, Lieutenant Colonel Cousans, acted in the "capacity of an accuser, prosecutor, Judge and executor." By Executive Order No. 9830 of February 24, 1947, the Heads of each Federal Agency was given the authority and the responsibility to handle all personnel actions regarding persons employed by his agency. The Secretary of the Air Force has final responsibility and authority over all civilian personnel employed by the Air Force (Section 204, National Securities Act, 1947, as amended August 10, 1949, 61 Stat. 500, 63 Stat. 581, 5 U.S.C. 171(d)). He has the power to delegate his authority [over all civilian personnel] to his subordinates (Section 12, Public Law 600, 79th Congress, 60 Stat. 809, 5 U.S.C. 22(a)). The Secretary of the Air Force has, as manifested in the Air Force Manual, delegated his authority over civilian employees of the Air Force to the Com-

manders of various Air Force bases (Air Force Manual 40–1, Section 1, ¶4).

Lieutenant Colonel Cousans, as Commander of the 1608th Civil Engineering Squadron, had the authority and the responsibility for effecting all civilian personnel actions. This authority included the ability to appoint and to separate civilian employees (Air Force Manual 40–1, Section 1, ¶4, 5). Lieutenant Colonel Cousans, in removing appellant Clarence Studemeyer from his position with the Air Force, acted well within the ambit of his authority and according to the procedures proscribed in the Air Force Manual and the Veterans Preference Act of 1944 (5 U.S.C. 863). Therefore, the District Court properly granted appellee's motion for summary judgment. *Ellis* v. *Mueller*, 108 U.S. App. D.C. 174, 280 F. 2d 722, *cert. denied*, 364 U.S. 883 (1960); *Hargett* v. *Summerfield*, 100 U.S. App. D.C. 85, 243 F. 2d 290, *cert. denied*, 353 U.S. 970 (1957); *Saggan* v. *Young*, 100 U.S. App. D.C. 3, 240 F. 2d 865 (1956); *Neufeld* v. *United States*, 138 F. Supp. 271, 133 Ct. Cl. 825 (1956); *Kohlberg* v. *Gray*, 93 U.S. App. D.C. 97, 207 F. 2d 35 (1953); *Powell* v. *Brannon*, 91 U.S. App. D.C. 16, 196 F. 2d 871 (1952); *Kutcher* v. *Gray*, 91 U.S. App. D.C. 266, 199 F. 2d 783 (1952); *Bailey* v. *Richardson*, 86 U.S. App. D.C. 248, 182 F. 2d 46 (1950).

No authority holds that in an employee discharge case of this kind procedural due process requires a speration of functions similar to the separation of powers in the National Government. The procedure followed in this case has been recognized as sufficient since its adoption. Judicial review has always been limited to determining procedural propriety and the existence or non-existence of arbitrary action. *Eustace* v. *Day* (No 16780, decided December 20, 1962).

II.

Appellant was not denied a personal "hearing"

Appellant, Clarence Studemeyer, contends that he was denied a personal "hearing" on his removal from employment with the Air Force, and that the denial of such a "hearing" violated the express provisions of the Veterans Preference Act

of 1944 (5 U.S.C. 863). This contention is patently without merit and clearly contradicted by the record. On two separate occasions appellant was informed that Lieutenant Colonel Cousans and Colonel Ralston would be available to discuss his case with him, and in each instance he was informed as to a specific date upon which a personal interview would be afforded him (Appendix 1A, 2A). Appellant did not avail himself of either of these opportunities (Appendix 3A). Therefore, his claim that a personal "hearing" was denied him is not a correct statement of fact. Moreover, his failure to avail himself of the opportunity of a personal appearance constitutes a waiver of any right he might have to a personal appearance.[2] *Hart* v. *United States*, 284 F. 2d 682 (Ct. Cl., 1960); *cf. O'Brien* v. *United States*, 284 F. 2d 694 (Ct. Cl. 1960); *Washington* v. *Summerfield*, 97 U.S. App. D.C. 105, 228 F. 2d 452 (1955).

III.

Failure of the Air Force to produce requested witnesses did not deprive appellant of procedural due process

Appellant Clarence Studemeyer's final contention—that he was deprived of procedural due process because the Air Force failed to produce, at the December 9, 1960, hearing before the Regional Office of the Civil Service Commission, witnesses which appellant had requested—is as non-meritorious as his two prior arguments.

The Civil Service Commission has no subpoena power. (5 C.F.R. § 22.607.) The burden of producing witnesses at a Commission hearing is upon the party who desires their presence. *Williams* v. *Zuckert*, 111 U.S. App. D.C. 294, 296 F. 2d 416 (1961). See *Caplan* v. *Connally*, 112 U.S. App. D.C. 42, 299 F. 2d 126 (1962), (cert. pending); *Deving* v. *Campbell*, 90 U.S. App. D.C. 171, 194, F. 2d 867 *cert. denied*, 344 U.S. 826 (1952). Moreover, failure on the part of the Air Force to

[2] It is noted that appellant received a full and proper hearing before the Fifth Regional Office of the United States Civil Service Commission on December 9, 1960 (R.A.P. December 9, 1960).

produce requested witnesses does not constitute a denial of appellant's procedural rights.[3] *Ellis* v. *Mueller, supra.*

Appellant cites the Court to a recent decision of the Supreme Court in *William* v. *Zuckert* (No. 133, decided January 14, 1963) to support his contention that failure to produce requested witnesses constitutes procedural error in the proceedings before the Civil Service Commission. However, the Supreme Court's opinion does not support appellant's position, but in fact further crystalizes the lack of merit in his contention. The Supreme Court in *Williams* dismissed the writ of certiorari as being improvidently granted; holding that the petitioner had failed to bring himself within the regulations upon which he relied. More specifically, the Court held that the petitioner did not make a timely request for the witnesses he sought nor did he "assume the initial burden of producing them." *Williams* v. *Zuckert,* No. 133, decided January 14, 1963 (S.O. p. 2). The record clearly shows that appellant also failed to make any effort to produce the witnesses he sought (Appendix 4A). Thus, he too failed to assume the "initial burden" of producing the requested witnesses, thereby foreclosing himself from alleging any procedural defect arising out of the Air Force's failure to produce the requested witnesses. *Williams* v. *Zuckert, supra.*

IV.

(WOODROW STUDEMEYER)

Appellant was removed in accordance with the procedures prescribed by the Veterans Preference Act of 1944

Appellant, Woodrow Studemeyer, also contends that he was improperly discharged from his position with the Air Force because his Commanding Officer acted in the "capacity of an accuser, prosecutor, judge and executor." The only factual difference between the case of Clarence Studemeyer and that of Woodrow Studemeyer is that Woodrow's Commanding Officer was Lieutenant Colonel Edward M. Hockwald. There-

[3] It is noted that two of the witnesses which appellant requested were in fact present at the hearing (R.A.P. December 12, 1960).

fore, the same legal principles which refute this argument as made by appellant Clarence Studemeyer are clearly as applicable to refute the argument as advanced by appellant Woodrow Studemeyer (See Argument I in the Appeal of Clarence Studemeyer, *supra*).

V.

Appellant was not denied a personal "hearing"

Appellant Woodrow's contention that he was denied a personal "hearing" relating to his dismissal from employment is at patently frivolous as the contention made by appellant Clarence. The record clearly shows that appellant Woodrow was given ample opportunity to personally meet with his Commanding Officer to discuss his proposed removal (Appendix 7A). Therefore, he had ample opportunity to avail himself of a personal appearance, if he so desired, thus satisfying any requirements imposed by the Veterans Preference Act of 1944. *Hart* v. *United States*, *supra*; *O'Brien* v. *United States*, *supra*; *Washington* v. *Summerfield*, *supra*; *Neufeld* v. *United States*, *supra*. Appellant Woodrow did not seek a personal hearing and therefore he also is estopped from claiming that his procedural rights were violated.[4]

CONCLUSION

Wherefore, it is respectfully submitted that in each of the instant appeals the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT B. NORRIS,
BARRY I. FREDERICKS,
Assistant United States Attorneys.

[4] It is noted that appellant Woodrow Studemeyer received a full and proper hearing before the Fifth Regional Office of the Civil Service Commission on December 12, 1960 (R.A.P. Dec. 12, 1960).

APPENDIX

APPENDIX

INDEX

1608TH CIVIL ENGINEERING SQUADRON

(1608th Air Base Group, MATS)

UNITED STATES AIR FORCE

Charleston Air Force Base,

South Carolina

19 October 1960

REPLY TO
ATTN. OF: BCES

SUBJECT: Notice of Proposed Removal—Reply Thereto

TO: Mr. Clarence Studemeyer, 103 Temple Avenue, North Charleston, South Carolina

1. Reference is made to your letter, subject as above, dated 17 October 1960, which requested a hearing before the head of the agency.

2. In view of the fact that the term "head of the agency" is rather ambiguous and can be interpreted to mean different levels of command and also in view of the fact that it is not clear whether you desire a hearing before final decision is made or subsequent thereto, you are advised that I will be available to discuss or explain all parts of my letter with you during normal duty hours until close of business, 24 October 1960. A final decision will not be made until after COB, 24 October 1960.

3. You are also advised that an effort was made to locate you on the afternoon of 18 October 1960 for the purpose of determining before whom and when you desired a hearing. However, this determination could not be made since you could not be located.

HARRY P. COUSANS,
Lieutenant Colonel, USAF, Commander.

(1A)

Mr. Taylor said that he personally delivered the letter of October 26th to Mr. Uricchio on that date.

* * * * *

Mr. Uricchio stated that Mr. Studemeyer had written Mr. Taylor asking for the appearance of witnesses at the hearing. Mr. Taylor replied to Mr. Studemeyer that he would have to arrange for his own witnesses. Mr. Taylor objected to the above remarks as not being pertinent, saying the Commission's policy is clear regarding the arrangement of witnesses for the hearing. In reply to a question put to him by Mr. Taylor, Mr. Studemeyer said that he had made no arrangements to contact any of these witnesses. Mr. Uricchio submitted as Hearing Exhibit 4 letter of November 28, 1960. The hearing examiner submits the above to the Regional Director for a decision as to relevancy.

* * * * *

UNITED STATES CIVIL SERVICE COMMISSION

Fifth United States Civil Service Region

Office of the Director

Atlanta 3, Georgia

February 7, 1961.

Appeal of Mr. Clarence Studemeyer Under Section 14 of the Veterans' Preference Act of 1944, as Amended

PART I—INTRODUCTION

On November 7, 1960, the appeal of Mr. Clarence Studemeyer, the appellant was received in the Regional Office. He appealed from an adverse decision dated November 1, 1960, signed by Lt. Col. Harry P. Cousans, Commander, 1608th Civil Engineering Squadron, U.S. Air Force, Charleston Air Force Base, South Carolina (Exhibit 23), removing him from the position of Plumber Foreman, effective November 3, 1960. The removal was based upon charges.

PART II—BASIS FOR ACCEPTANCE OF THE APPEAL

Removal is an adverse action under the terms of Section 14 of the Veterans' Preference Act of 1944, as amended. Appeal rights in this case are otherwise established by (1) permanent type of appointment; (2) completion of probationary period; (3) entitlement to veteran preference; and (4) timeliness of the appeal.

PART III—EXAMINATION OF PROCEDURES

a. *Agency's Advance Notice and Appellant's Right to Answer:* The notice of proposed removal (Exhibit 14) was dated September 29, 1960, and signed by Lt. Col. Harry P. Cousans. The reasons advanced in proposing removal were set forth in this notice. The appellant was advised of his right to reply personally and in writing, and he was allowed fifteen working days from the date of receipt of the notice in which to make a reply.

There is much evidence and testimony in the file concerning whether or not the appellant had a right to reply personally. The nub of all the testimony is that the appellant did not avail himself of ample opportunity to make the personal reply to which he was entitled. We find no evidence that the appellant was not accorded a right to reply personally and in writing. His election in his written answer (Exhibit 17) to state that he had endeavored to comprehend the meaning of the charges and had been unable to conceive a full understanding of the allegations is without foundation in our view since the charges are manifestly clear and explicit. Without some statement as to obscurities in the charges mere assertions of the tupe appearing in this appellant's answer are unacceptable as a basis for ruling that the charges lacked specificity and detail. Moreover, as this case advanced, the appellant shows that he was able to make a defense to the charges.

The appellant received an advance notice of at least thirty days period.

b. *Appellant's Status During the Notice Period:* The appellant was maintained in a duty status in his regular position during the notice period.

c. *Agency's Notice of Adverse Decision:* The agency's notice of adverse decision (Exhibit 23) shows that all of the reasons originally advanced served as the reasons for the action decided upon. The appellant was properly notified of his right to appeal to the Commission.

The procedural requirements as to the above-discussed regulatory points are considered to have been met.

PART IV—DEVELOPMENT OF THE EVIDENCE

The evidence in this case was obtained through personal investigation at Charleston, South Carolina, on November 17 through November 22, 1960. At the conclusion of the investigation, the appellant requested a hearing. The hearing was held in Charleston, South Carolina, on December 9, 1960. At the conclusion of the hearing, an agreement was reached that the appellant's representative would submit certain other information. This was submitted and referred to the agency for comment and in this way, all the representations in the case were not in the record until January 17, 1961.

* * * * *

PART VI—FINDINGS AND RECOMMENDATIONS

It has been found that the procedural requirements as to the previously discussed regulatory points have been met.

It has been found that the sustained charges are substantive grounds for the action taken and that it was for such cause as will promote the efficiency of the service.

The action of the agency is sustained.

PART VII—NOTIFICATION OF RIGHT OF FURTHER APPEAL TO THE COMMISSION

No further appeal from this decision will be entertained unless it is submitted to the Board of Appeals and Review, U.S. Civil Service Commission, Washington 25, D.C., within seven (7) calendar days after receipt of this decision. Notification to the Board that you are filing a further appeal should include concurrent advice to us of the further appeal so that the case files can be transmitted promptly to the Board.

Since there is no further right to a hearing, any additional representations should be submitted in duplicate with the appeal to the Board of Appeals and Review. Any correspondence about such appeal should be with that office.

(S) G. J. Pugh
G. J. PUGH
Appeals Examiner.

(S) Hammond B. Smith
HAMMOND B. SMITH
Regional Director.

(S) F. S. Chalmers
F. S. CHALMERS
Regional Veterans Federal Employment Representative.

1608TH AIR TERMINAL SQUADRON
1608th Air Transport Wing (H) MATS)
UNITED STATES AIR FORCE
Charleston Air Force Base, South Carolina

1405 *27 October 1960.*

TCO
Informal Hearing:
Mr. Woodrow Studemeyer, 1608th Air Terminal Squadron

1. Reference is made to your letter of 21 October 1960.

2. Civil Service Commission and Air Force regulations stipulate that an employee is entitled to an interview or informal hearing on the charges before an agency official before a final decision is reached. You may exercise this right by discussing your case with LtCol E. M. Hockwald at the 1608th Air Terminal Squadron Orderly Room at 0930, 31 October 1960.

/s/t/JOHN H. SCHWEITZER,
Lieutenant Colonel, USAF, Commander

UNITED STATES CIVIL SERVICE COMMISSION

Fifth United States Civil Service Region

Office of the Director

Atlanta 3, Georgia

Appeal of Mr. Woodrow Studemeyer Under Section 14 of the Veterans' Preference Act of 1944, as Amended

PART I—INTRODUCTION

On November 16, 1960, Mr. Woodrow Studemeyer, the appellant, appealed to the Regional Office from an adverse decision dated November 9, 1960, signed by Lt. Col. Everett M. Hockwald, Commander, 1608th Air Transport Wing, Charleston Air Force Base, South Carolina, removing him from the position of Aircraft Freight Loader, W–05, Step 2, $1.98 per hour, effective November 18, 1960, on the basis of charges.

PART II—BASIS FOR ACCEPTANCE OF THE APPEAL

Removal is an adverse action under the terms of Section 14 of the Veterans' Preference Act of 1944, as amended. Appeal rights in this case are otherwise established by (1) permanent type of appointment; (2) completion of probationary period; (3) entitlement to veteran preference; and (4) timeliness of the appeal.

PART III—EXAMINATION OF PROCEDURES

a. *Agency's Advance Notice and Appellant's Right to Answer:* The notice of proposed removal (Exhibit 9) dated October 17, 1960 and signed by Lt. Col. Hockwald, informed the appellant of the reasons for the proposed action. The appellant was advised of his right to reply personally and in writing to the proposal notice and was allowed a reasonable time (14 days) in which to answer. The appellant replied in writing on October 21, 1960 (Exhibit 10) and requested a

hearing before the Head of the Agency. On October 27, 1960, the agency advised the appellant (Exhibit 11) that Civil Service Commission and Air Force Regulations stipulate that an employee is entitled to an interview or informal hearing on the charges before an agency official prior to a final decision; that he could exercise this right by discussing his case with Lt. Col. E. M. Hockwald at the 1608 Air Terminal Squadron Orderly Room at 0930 hours on October 31, 1960. However, the record shows that the appellant did not exercise this right. The record reflects that the appellant understood the charge sufficiently well to join issue; hence, the requirement of the law and the regulations as to specificity and detail is considered to have been met. The appellant received an advance notice of at least thirty days.

b. *Appellant's Status During the Notice Period:* The appellant was retained in an active duty status during the notice period.

c. *Agency's Notice of Adverse Decision:* The agency's notice of adverse decision dated November 9, 1960 (Exhibit 12) showed that the reasons originally advanced served as the reasons for the action decided upon. The appellant was properly notified of his right to appeal to the Commission.

The procedural requirements as to the above-discussed regulatory points are considered to have been met.

PART IV—DEVELOPMENT OF THE EVIDENCE

The evidence in this case was obtained through personal investigation at Charleston AFB and Charleston, South Carolina on November 28, 30; December 1 and 2, 1960. The appellant requested a hearing before a representative of the Commission (Exhibit 20) and a hearing was conducted at Charleston AFB, South Carolina on December 12, 1960. Representatives of both parties were present at the hearing. The proceedings of the hearing were reported in summary form and copies furnished the parties for review. All exceptions to the summary have been considered and are a part of the record in this case.

* * * * *

PART VI—FINDINGS AND RECOMMENDATIONS

It has been found that the procedural requirements as to the previously discussed regulatory points have been met.

It has been found that the sustained charge and the cited elements of the appellant's past disciplinary record are substantive grounds for the action taken and that it was for such cause as will promote the efficiency of the service.

The action of the agency is sustained.

PART VII—NOTIFICATION OF RIGHT TO FURTHER APPEAL TO THE COMMISSION

No further appeal from this decision will be entertained unless it is submitted to the Board of Appeals and Review, U.S. Civil Service Commission. Washington 25, D.C., within seven calendar days after receipt of this decision. Notification to the Board that you are filing a further appeal should include concurrent advice to us of the further appeal so the case files can be transmitted promptly to the Board.

Since there is no further right to a hearing, any additional representations should be submitted in duplicate with the appeal to the Board of Appeals and Review. Any correspondence about such appeal should be with that office.

(S) L. C. Duncan
L. C. DUNCAN,
Assistant Appeals Examiner

(S) William H. Rima, Jr.,
WILLIAM H. RIMA, JR.,
Acting Regional Director.

(S) F. S. Chalmers,
F. S. CHALMERS,
Regional Veterans Federal Employment Representative.

U.S. GOVERNMENT PRINTING OFFICE: 1969

No's. 17,464 & 17,465 (Consolidated)

SUPPLEMENTAL BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1962

No. 17,464

CLARENCE STUDEMEYER,
Appellant,

v.

JOHN W. MACY, JR., Chairman, United States Civil Service Commission, et al.,
Appellees.

No. 17,465

WOODROW STUDEMEYER,
Appellant,

v.

JOHN W. MACY, JR., Chairman, United States Civil Service Commission, et al.,
Appellees.

Appeal from the United States District Court for the District of Columbia

---

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United States Court of Appeals

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JOHN W. MACY, JR., Chairman, United States Civil Service Commission, et al.,
Appellees.

Appeal from the United States District Court for the District of Columbia

---

SUPPLEMENTAL BRIEF

The brief of the Appellants which was filed on February 4, 1963 was prepared and sent to the printer prior to knowledge of counsel for the Appellants of the decision

of the Supreme Court of the United States in the case of Daniel Alton Williams, Petitioner v. Eugene M. Zuckert, Secretary of the Air Force, et al. decided on January 14, 1963. This point involved in that case was not raised in the original brief because this Court had already ruled on the question adversely in the case of Williams v. Zuckert, et al., 296 F.2d 416.

Attention of the Court is directed to the fact that one of the Appellants, Clarence Studemeyer, filed an affidavit in support of his motion for summary judgment which is shown on pages A.11, 12 and 13 of the Appendix. In this affidavit the Appellant alleges that he requested the attendance of persons to attend his hearing for the purpose of testifying in his behalf, namely: Lt. Louis L. Clipp, M/Sgt. Luther J. Bartlett, Walter A. Porter, A/1c, Charles P. Stancil, A/1c, Gary W. Stanfield, A/2c, Ollie B. Miller, A/1c, Kenneth H. Owen, A/1c, William J. Donovan, Civ., John M. Dunning, Civ., Harry P. Cousans, Lt. Col., and W. D. Henderson, S/Sgt.

The persons requested as witnesses by the Appellant, Clarence Studemeyer, were employed at the Charleston Air Force Base located at Charleston, South Carolina. The hearing was held at the County Court House in Charleston, South Carolina, and the witnesses requested were immediately available and could have been readily produced by the officials of the Air Force Base. At least four of the witnesses requested namely, Walter A. Porter, Charles P. Stancil, Kenneth H. Owen and W. D. Henderson had signed affidavits adverse to the Appellant, Clarence Studemeyer.

The officials of the Charleston Air Force Base refused to have present at the hearing nine of the persons designated. The only ones who were present at the hearing were Harry P. Cousans, Lt. Col. and William J. Donovan, Civ. Application for the appearance of all witnesses was

timely made by the then counsel for the Appellant, Clarence Studemeyer. The case therefore appears to be squarely within the ruling of the case of Williams v. Zuckert, Secretary of the Air Force, et al., supra.

The language of the majority opinion pertinent to this issue is as follows:

> "The request for production of the witnesses, made only at the hearing by petitioner's counsel, was neither timely nor in conformity with the applicable regulations, which contemplate that the party desiring the presence of witnesses, either for direct or cross-examination, shall assume the initial burden of producing them.
>
> Had petitioner discharged this burden by timely attempt to obtain the attendance of the desired witnesses and through no fault of his own failed, then, to give meaning to the language contained in the regulations affording the "opportunity . . . for cross-examination of witnesses," the Air Force would have been required, upon proper and timely request, to produce them, since they were readily available, and under the Air Force's control. Vitarelli v. Seaton, 359 U.S. 535, 544-545, would so require. Here, however, though petitioner seeks to rely upon the regulations, he has failed to bring himself within them."

It is therefore clearly apparent that this procedural error exists in the case of Clarence Studemeyer. Furthermore, following the opinion in the case of Williams v. Zuckert, Secretary of the Air Force, et al., supra, there can be no doubt on the basis of the cases cited in the opinion that the Appellants were entitled to a fair and honest hearing before the officials of the Charleston Air Force Base and that this hearing could not be conducted by the same Lt. Colonels who had filed the charges against these Appellants.

For the reasons herein stated in this Supplemental brief and the original brief of the Appellants, judgment in these cases should be reversed.

Respectfully submitted,

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